IN THE

Supreme Court of the United States

October Term, 1940

No. 270

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE WILL OF GEORGE A. BOLLES, DECEASED,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The principal contentions made by respondent, summarized, are:

1. That the petitioner was too late in raising the federal constitutional question.

2. That the question here involved is merely one of state procedure which does not raise a federal question, and was rightly decided anyway.

Reply to Respondent's Contention That the Constitutional Question Was Raised Too Late

Respondent claims it was the duty of petitioner to assert in one of several suggested ways, in the *trial* court, that if the court should sustain respondent's claim of *res judicata*, that such decision would be an unconstitutional act of the state in violation of petitioner's right under the Fourteenth Amendment. This, we submit, is plainly wrong.

It was petitioner's contention that under the then existing and established law of Ohio respondent's claim of *res judicata* on its merits was unfounded. Manifestly if the trial courts should hold, as in fact both lower courts did hold, that petitioner was right in this position, then no constitutional question could be raised in that court. The act of *respondent* in asserting the claim of *res judicata* was not an infringement of petitioner's constitutional rights. The Fourteenth Amendment protects against action by the *state*. The mere assertion of a defense by an individual presents no constitutional question. The rule as to state action is the same whether the state acts unconstitutional by legislative or by judicial action. The mere passage of an unconstitutional statute does not give an individual the right to complain of it until the state acts to enforce it to his injury.

Ohio Power & Light Co. vs. Pfost, 286 U. S. 165, 186;

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 289;

Jeffrey Mfg. Co. vs. Blagg, 235 U. S. 571, 576;

Yazoo & Mississippi Valley Railroad Co. vs. Jackson Vinegar Co., 226 U. S. 217.

So the mere assertion by the respondent of the defense of *res judicata* and the denial of its validity by the lower courts, did not either require or entitle petitioner to assert any rights under the Federal Constitution or constitute any infringement of her constitutional rights by the state. It was only when the state, through its Supreme Court, departed from the established law and sustained the defense of *res judicata,* that petitioner was threatened with injury requiring and entitling her to assert her rights under the Federal Constitution.

The situation is similar to that in the case of *Grannis vs. Ordean,* 234 U. S. 385, where this court speaking by Mr. Justice Pitney said:

> "There is a motion to dismiss, upon the ground that the federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the state, the federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged federal right. * * *" (Page 392.)

As both lower courts held against the defense of *res judicata* upon its merits, it follows that under the familiar rule that courts will not decide constitutional questions where they are not necessarily involved in the pending litigation, neither lower court would or could properly have decided the constitutional question now raised by petitioner. Petitioner could not in fact have raised the constitutional question before she did except

hypothetically, that is, by saying that if the court should sustain the defense of *res judicata* that then the state, through its court, would be acting unconstitutionally, and as the lower courts held against the defense of *res judicata* on its merits, they could not have decided the constitutional question except hypothetically. Hypothetical constitutional questions have no place in court procedure.

It was the law of Ohio, established by many decisions, as shown in petitioner's brief herein, that the decision in the former case was not *res judicata,* both because of lack of jurisdiction of the Probate Court over the issues in the present case, and for the reason that the causes of action in the Probate Court and in the present case were entirely different. The law of Ohio in this respect was recognized and followed by both lower courts and became the law of the case, subject to review by the Supreme Court. When the Supreme Court handed down its opinion sustaining the defense of *res judicata,* the state, for the first time, acted in violation of petitioner's constitutional right under the Fourteenth Amendment to due process of law. At that point, and prior to the issuance of a mandate by the Supreme Court, petitioner was first called upon to and did assert that carrying said decision into effect would be in violation of her right to due process.

The cases cited by respondent at pages 17 and 18 of its brief in support of the statement that this court will not consider claims first made in an application for rehearing (except *Herndon vs. Georgia,* which sustains our position) are not in point. None of them (with that exception) involves a situation such as that in the case at bar where the complaint is of unconstitutional action by

the state resulting from a decision of the Supreme Court, retroactively changing the law so as to deprive a party of all opportunity for a hearing upon the merits of his cause of action. The controlling cases are those cited in our brief, *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer,* 281 U. S. 673, and *Herndon vs. Georgia,* 295 U. S. 441. We note that no effort is made in the brief for respondent to distinguish the reasoning either of the majority opinion or of the dissenting opinion in *Herndon vs. Georgia.* The attempted distinction of *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer,* entirely misses the point of that case. Respondent attempts to establish that the decision in that case depended upon the fact, incidentally mentioned by the court, that the possibility of relief before the Tax Commission was not suggested until the Supreme Court filed its opinion. This point was not made by this court in connection with the question of the timeliness of raising of the constitutional question. It was made in connection with the ruling by this court that the decision of the State Supreme Court came at a time when it was too late for plaintiff to proceed before the Tax Commission, and, hence, denied plaintiff due process of law. The court said that the federal claim made by application for rehearing after the decision of the Supreme Court "was timely since it was raised at the first opportunity" and cited the decision of this court in *Missouri vs. Gehner,* 281 U. S. 313. In that case this court said, page 320:

> "* * * It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. * * *"

This court pointed out that the Board of Equalization had completely eliminated the bonds from its calculations, and, hence, that the company "could not earlier have assailed this action as violative of the constitution and laws of the United States." Just so here the lower courts completely eliminated the defense of *res judicata* and petitioner could not have assailed any action of the court as violative of the constitution of the United States as no such action was taken until the Supreme Court handed down its opinion.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, this court held that a question under the federal constitution raised for the first time by an assignment of error in the State Supreme Court designed to bring the case to this court, was raised in time. In that case the State Supreme Court had entered final judgment based on evidence which had been offered and ruled out, but nevertheless placed in the record by the plaintiff, which the defendant had not attempted to meet. This court, speaking by Mr. Justice Holmes, said, in part:

> "* * * The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a

> ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co. vs. Los Angeles,* 227 U. S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the state by his assignment of errors. We do not see what more he could have done." (P. 320.)

We think the situation here is analogous to that in the *Saunders case.* The reversal and entry of final judgment in the former *Bolles case* was, as shown in our first brief herein, pages 26 and 27, equivalent under the rule of *Bank vs. Shadyside Coal Co.,* 121 O. S. 544, to a determination by the Supreme Court of Ohio that petitioner's exceptions in the Probate Court could not be supported by a claim of equitable title and hence that a remand to permit a new trial would be useless. Petitioner had no reason to anticipate that the courts in the present case would take a position contrary to that thus taken in the former case and contrary as well to many other decisions of the state courts of Ohio, and hence in the language of Mr. Justice Holmes, "was not bound to ask a ruling or to take other precautions in advance" of the decision by the Supreme Court of Ohio to the effect that she could and should have pleaded and proved her equitable rights and title in the proceeding in Probate Court. We respectfully submit that the raising of the constitutional question on application for rehearing was timely under the decisions of this court.

Reply to Respondent's Contention That a Mere Matter of State Procedure Is Here Involved, and Was Correctly Decided Anyway.

We do not dispute the power and right of the Supreme Court of Ohio to interpret the statutes of Ohio and to establish the law of that state in general, but we do contend that in so doing the Supreme Court of Ohio, like any other instrumentality of the state, may not deprive a person of due process of law without violating such person's rights under the Fourteenth Amendment and giving rise to a question properly subject to review by the Supreme Court of the United States.

In the case at bar, we believe it is established in our former brief that the result of the decision of the Supreme Court of Ohio has been to deprive petitioner of any opportunity for a hearing on the merits of her equitable claims. This result has been reached by a decision retroactively conferring full equitable jurisdiction upon the Probate Court of Ohio contrary to the established law of Ohio in effect when petitioner still had an opportunity to proceed in that court. Such a decision does not involve a mere matter of state procedure, but involves a matter of federal constitutional right. In connection with its argument on this point respondent seeks to convince this court that the change in the law of Ohio was brought about not by the decision of the Supreme Court herein, but by the passage of the new Probate Code of Ohio which took effect on January 1, 1932. In this connection they say at page 22:

> "In asking this court to review the present case opposing counsel are in reality asking this court to interpret an Ohio statute and to define the jurisdiction of a probate court upon exceptions to an inventory."

This is a misleading statement. What we are asking this court to decide is that up to the time of the decision by the Supreme Court of Ohio in the present case, it was the settled law of Ohio (both before and after the adoption of the Probate Code) that Probate Courts did not have jurisdiction to hear and determine either (a) questions of express trust, or (b) questions of constructive trust, with respect to property being administered by officers of such courts, and that the decision in the present case retroactively conferring such jurisdiction on the Probate Court and barring petitioner from any determination on the merits of her claims of express and constructive trust because she did not present them to the Probate Court, deprives her of due process of law in violation of the Fourteenth Amendment. The jurisdiction of the Probate Courts in Ohio hereafter will be what the Supreme Court of Ohio says it shall be, in the absence of further legislation, notwithstanding any decision which may be rendered herein by this court. But if this court sustains petitioner's contentions she will have her claims of express and constructive trust heard and determined on their merits notwithstanding the change in the jurisdiction of the Probate Court effected by the decision of the Supreme Court of Ohio herein. Such change will be effective from and after the date of the decision of the State Supreme Court, but will not be effective to bar petitioner's rights herein.

In short, while we recognize the power of the Supreme Court of Ohio to interpret the Probate Code of Ohio and to enlarge the jurisdiction of the Probate Court to whatever extent the Supreme Court may deem proper, we deny the power of the Supreme Court to enlarge the

jurisdiction of the Probate Court retroactively so as to deprive petitioner of her constitutional right to a hearing.

That never until the decision in the present case had it been held that the Probate Court had jurisdiction to determine questions of express trust and of constructive trust, we submit, is made clear by our former brief. We note that no effort is made in respondent's brief to meet the contentions therein contained to the effect that proceedings on exceptions to an inventory in the Probate Court are special statutory proceedings and cannot be appealed for trial *de novo* to the Court of Appeals. *In re Estate of Gurnea,* 111 O. S. 715. Whereas, suits to establish express or constructive trusts are equity or chancery cases and are appealable of right for trial *de novo* in the Court of Appeals. See cases cited pages 11 to 14 of our former brief.

Since proceedings on exceptions to an inventory and suits to establish express or constructive trusts are so entirely different in their nature, and since the Court of Appeals has full jurisdiction on trial *de novo* as to such trust suits and has no such jurisdiction on exceptions to an inventory, it necessarily follows that under the law as it stood prior to the present decision petitioner could not have had her claims of express and constructive trust heard and determined on exceptions to the inventory. The Supreme Court of Ohio did not attempt to reconcile its decision herein with its decision in *In re Gurnea,* 111 O. S. 715, and respondent has made no attempt to do so either. We think it is obvious that the decisions are irreconcilable.

On pages 18 and 19 of its brief, respondent says:

> "With the exception of the case of *Juhascz vs. Juhascz* (1938), 134 O. S. 257, 16 N. E. (2d) 328,

> opposing counsel have cited *no* Supreme Court case and *no* lower court case on the jurisdiction of the Probate Court upon exceptions to an inventory under the new code. * * *" (Italics are respondent's.)

We have, however, cited a number of cases dealing with the broader question which is here involved, which is whether the Probate Court under *any kind of* proceeding, has the broad powers of a court of equity which are necessary in dealing with express trusts, and, particularly, in impressing constructive trusts upon property. We have shown that in *State ex rel. Black, Executor, vs. White, Judge,* 132 O. S. 58 (1936), decided four years after the adoption of the new Probate Code, the Supreme Court held:

> "* * * The Probate Court is a court of limited jurisdiction, having only such power as is conferred upon it by the constitution and statutes of Ohio, and *has not the inherent general jurisdiction of common law and chancery courts.* * * *" (P. 66.) (Italics ours.)

We have shown that in that case the court reaffirmed its holding in *Gilliland vs. Sellers,* 2 O. S. 223 (1853), that

> " 'The decree of a probate court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as *coram non judice* and void.' " (132 O. S. 66.)

We have shown that in *Goodrich, Admr., vs. Anderson,* 136 O. S. 509, decided by the Supreme Court of Ohio the same day as the case at bar, the court held:

> "* * * there is a limitation upon the 'plenary power' granted to Probate Court in the last paragraph of Section 10501-53, General Code, * * *" (P. 511.)

and that a special proceeding in that court

> "* * * may not be used primarily as a substitute for a civil action for a money judgment wherein pleadings are required properly to define the issues." (P. 512.)

and we have shown that there are other decisions by the Supreme Court and lower courts of Ohio to the same effect, see our brief, pages 15 to 19. Respondent entirely ignores these decisions and contents itself on this point with the citation of *Unger vs. Wolfe*, 134 O. S. 69, 15 N. E. (2d) 955 (1938), holding merely that (syllabus):

> "Under the provisions of Section 10501-53, General Code, the Court of Probate has exclusive jurisdiction as to the allowance of fees to an attorney for his services in the unsuccessful prosecution of an application for the removal of the guardian of an incompetent."

a decision which certainly does not support respondent's contention that the Probate Court is a court having full chancery jurisdiction.

We note that not only does respondent's brief fail to comment upon the cases cited in our brief showing the lack of chancery jurisdiction in Probate Court, but also completely fails to cite any case holding that the court has such chancery jurisdiction. Such failure is due to the fact that until the decision in the present case was rendered no such decision had ever been rendered in Ohio.

Capital is sought to be made by respondent of the fact that in petitioner's original exceptions in the Probate Court some language was used which might have been treated as an attempt to assert some equitable right. The final judgment in the former case, however, was upon amended exceptions which the Supreme Court held

presented only questions of legal title. Thus there was no attempt made to obtain and no adjudication obtained of any equitable rights in the former case.

It is stated on page 9 of respondent's brief that the former proceeding and the present suit are identical in five particulars, but this statement is incorrect, at least in so far as particulars numbered 3 and 4 are concerned. They are:

> "(3) The claim of property in the securities is the same, namely, the present complete legal and equitable title to all the securities;
> "(4) The relief demanded is the same, namely, the endorsement and surrender of possession of the securities and of all proceeds and dividends therefrom;".

The facts are that the claim of property in the securities asserted in the former suit by petitioner was that she was and had been during her deceased husband's lifetime the owner of full legal and equitable title to the securities by reason of a gift *inter vivos* from her husband. In the present case her contentions are two—in the alternative. First, that her husband owned the legal title to the securities which passed to the respondent as his executor, subject to an express trust in favor of petitioner established by her husband in his lifetime, under which she became entitled to receive the properties from his executor after his death. And second, that if her husband failed to complete the express trust in her favor, that the circumstances are such as that the executor should be regarded as holding the legal title subject to a constructive trust in her favor which should be impressed upon the property by a court of equity. It is

obvious, therefore, that respondent is wrong in the assertion that the *claim* of property is the same in both cases.

It is not true that the relief demanded in the two cases was the same, as in the present case petitioner prayed (R. 13, 14) that the court order the executor to,

> "* * * execute said trust under which said testator held and said executor now holds the personal property hereinbefore described and to transfer, turn over and deliver to the plaintiff each and all of said items of personal property and to do such other things as are necessary to enable the plaintiff to receive the benefits of said trust under which said testator held and said executor now holds said property, or, in the event said court refuses to grant plaintiff's above prayer, that the court find and order that The Toledo Trust Company, executor of the will of George A. Bolles, deceased, holds said property as the successor of said testator, upon a constructive trust for the sole and exclusive benefit of the plaintiff, Clara C. Bolles, and order that said executor execute said trust and transfer, turn over and deliver to the plaintiff, each and all of the items of personal property hereinbefore described and to do such other things as are necessary to enable the plaintiff to receive the benefits of the trust under which said testator held and executor now holds said property and for an order granting this plaintiff such other and further relief as the court deems just and equitable in the premises."

The prayer of her amended exceptions (R. 364) was:

> "Wherefore, said exceptor, Clara C. Bolles, prays that the court order and direct The Toledo Trust Company, executor of the will of George A. Bolles, deceased, to exclude from the inventory of the assets of the estate of said decedent the property hereinbefore described, to return to her each and all of the items of personal property herein-

> before described, and to do such things as are necessary to enable her to secure the transfer thereof upon the books and records of the respective corporations issuing said certificates and evidences of indebtedness, and for such other and further relief as the court deems just and equitable in the premises."

While it is of course true that the ultimate ends which petitioner sought to attain, first by her exceptions to the inventory and second by her present suit, were the establishment of rights in her behalf in the property, they were not the *same* rights. The rights which she sought to establish by the exceptions were *legal* rights not requiring the interposition of a court of equity, whereas the rights she sought to establish in the present suit were purely *equitable* rights such as could not be established otherwise than by decree of a court having full equity powers. In the former proceedings she asserted that the executor had *no* right, title or interest in the securities of any kind, whereas in the present case she asserts that the legal title to the property *is* in the executor and that only by relief in equity can her equitable rights therein be established. The long line of authorities cited at pages 37 to 42, inclusive, of our first brief herein, demonstrates that it was the law of Ohio until the decision in the present case that a decision against the existence of legal rights was not *res judicata* of equitable rights.

While we recognize that the question of what is *res judicata* is ordinarily a matter for decision by the state court, nevertheless we submit that its power in that respect has the same limitation as its power with respect to the interpretation of state statutes, that is, it cannot retroactively make that *res judicata* which was not *res*

judicata when the proceedings in question were had, if the effect of so doing is to deprive a party of all opportunity of a hearing on the merits of his claim.

We direct attention to the facts:

(a) That although respondent claims (brief page 25) that the Supreme Court of Ohio correctly applied the principles of *res judicata,* respondent makes no attempt to distinguish any of the cases cited by us at pages 39 to 42, inclusive, of our brief, which clearly show that under the law as it stood prior to the present decision, the decision on the Probate Court exceptions was not *res judicata,* and

(b) That the respondent makes no attempt to distinguish or explain why the decision of the court below was not contrary to the prior decisions of that court in *Conrad vs. Coal Company,* 107 O. S. 387 (1923), and *Industrial Commission of Ohio vs. Broskey,* 128 O. S. 372 (1934), holding that the choice of a wrong remedy does not bar the subsequent assertion of the proper remedy. The only attempt respondent makes to meet the rule of these cases is to cite the case of *American Surety Co. vs. Baldwin,* (1932) 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, and to claim that the court ruled against the same argument in that case that we make in this case, *i.e.,* that the mistaken choice of a remedy which does not exist is not *res judicata* as to a remedy which does exist. That claim of respondent is contrary to the facts. The situation in the *American Surety Company case* was entirely different. There, as is shown by the quotation from the opinion set forth in respondent's brief, page 28, the surety company moved to vacate a state court judgment instead of taking an appeal from the judgment to the State Su-

preme Court. It lost on its appeal *not because the decision of the court below on the motion was res judicata, but because it took the appeal too late.* The court's decision was to the effect that the surety company could not obtain an extension of the statutory time to appeal merely by first mistakenly attempting to obtain relief by motion to vacate. In the case at bar no such question was involved. The present suit was started at a time when petitioner had full right to institute it. The decision below in this case was not that by reason of the time lost in her futile attempt to obtain relief in the Probate Court her present suit could not be maintained, but on the contrary, was that her present suit is barred by *res judicata.* There were questions of *res judicata* in the *American Surety Company case,* but they involved an effort by the surety company to obtain relief through the federal courts after it had been denied relief in the state courts where it had had a hearing and decision by the State Supreme Court of the ultimate question, which was whether it was liable upon the bond involved in the litigation. See opinion page 165. The claim made in respondent's brief as to what was held by this court in the *American Surety Company case* is unfounded and misleading.

CONCLUSION

We respectfully submit that neither in the opinion of the Supreme Court of Ohio nor in the brief of respondent is there any showing made to the contrary of the contentions presented in our former brief, showing a denial to petitioner of all opportunity to have her equitable rights and titles heard and determined upon their

merits and that the only way in which a gross miscarriage of justice can be prevented is by a review by this court of the proceedings in the court below.

Respectfully submitted,

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